U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 March 2006

Case No.: 2004-LHC-1054

OWCP No.: 08-113315

IN THE MATTER OF

EDDIE D. DOVER,
Claimant

vs.

AMERADA HESS CORPORATION,
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY,
Carrier

APPEARANCES:

GARY B. PITTS, ESQ.,
On Behalf of the Claimant

THOMAS C. FITZHOUGH III, ESQ.,
On Behalf of the Employer/Carrier

Before: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore Harbor Workers' Compensation Act[1] (the Act), brought by Eddie D. Dover (Claimant) against Amerada Hess Corporation (Employer) and Liberty Mutual Insurance Company (Carrier).[2]

[1] 33 U.S.C. § 901 *et seq.*

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 12 Sep 05, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witness, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of

Claimant
Lisa Dover
William L. Quintanilla

Exhibits

Claimant's Exhibits (CX) 1-12
Employer's Exhibits (EX) 1-30[4]
Joint Exhibit (JX) 1

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witness, and the arguments presented.

STIPULATIONS[5]

1. There is Jurisdiction under the Act.

2. The injury occurred on 22 Jul 97.

3. The injury occurred within the course and scope of employment and there was an employee/employer relationship at the time of the accident.

4. Employer was properly notified of Claimant's injury.

5. There was proper and timely controversion.

6. Claimant reached maximum medical improvement (MMI) on 13 Mar 01.

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[2] For simplicity both Employer and Carrier are collectively referred to herein as Employer.
[3] I have reviewed and considered all testimony and exhibits admitted in to the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] Employer submitted EX-31 with its post-hearing brief. This exhibit will not be considered part of the record because the record was closed at the hearing, except for late submission of EX-30, Dr. Kushwaha's deposition. The Court's decision will not prejudice Employer as the substance of EX-31, reflecting that blood tests were not ordered by Dr. Cherlo until 2004, is already in evidence through CX-1, p. 104.
[5] JX-1.

ISSUES[6]

1. Nature and extent of disability.

2. Suitable alternative employment.

3. Average weekly wage at the time of injury.

4. Medical care benefits.

5. Attorney's fees and expenses.

FACTUAL BACKGROUND

The basic facts of this case are not in dispute. Claimant strained his back and groin while working for Employer on 22 Jul 97. Prior to his injury, Claimant worked in heavy labor positions. Claimant cannot return to his usual employment. Claimant received medical treatment from several doctors. Employer paid for Dr. Baker to perform an L4-L5 laminectomy in August 1998, but the surgery did not go well. Dr. Baker also gave Claimant a series of steroid injections, which Claimant believes caused his heart problems, weight gain, depression, and penile shrinkage.

Although Claimant did not seek pre-authorization, Dr. Ringer performed penile surgery that corrected the problems caused by the steroid injections. Nevertheless, Claimant still complains of depression due to his back pain.

In 2005, Claimant started treating with an orthopedic surgeon, Dr. Kushwaha. Dr. Kushwaha ordered a repeat MRI, which showed disc herniations, stenosis, and instability at L4-L5 and L5-S1. Claimant was not happy with his back surgery. He does not want to undergo another surgery and has decided to live with his pain. Claimant takes pain medication, anti-depressants, hypertension medication, and muscle relaxants on a daily basis.

POSITIONS OF THE PARTIES

Claimant contends that there is no suitable alternative employment. Because his surgery did not turn out well, he has a lot of physical restrictions, and is on pain medications. Therefore, he cannot do much of anything, let alone return to work in a sedentary, light, or medium duty position. He maintains he cannot reasonably obtain and keep employment since he is permanently totally disabled and must take daily pain medication. Claimant also contends his average weekly wage is $819.90.

[6] Id.

Claimant also contends his penile surgery with Dr. Ringer was reasonable and necessary. He seeks reimbursement of the cost of the surgery, $7,000. He maintains that he was not required to seek preauthorization because it was an emergency situation and because Employer had previously denied blood tests and an MRI. Claimant also contends he has the right to treat with a cardiologist.

Employer contends that Claimant "can certainly do more." Employer maintains Claimant did not present any evidence to support his claim for permanent total disability and that Claimant is permanently partially disabled based on the Labor Market Survey. Employer argues that it met its burden of establishing suitable alternative employment through Labor Market Surveys and that the uncontradicted medical evidence shows Claimant can work full-time.

Employer admits to a wage loss, but disagrees with Claimant regarding the amount. Employer argues that despite being medically cleared to work the jobs listed in the Labor Market Surveys, Claimant has made no efforts to obtain employment. Employer contends that all the jobs listed in the Labor Market Survey are consistent with Claimant's medications and Dr. Kushwaha's medical opinion.

Employer also argues that Claimant is not entitled to reimbursement for the penile surgery by Dr. Ringer because he did not seek preauthorization and did not provide any reports describing the procedure, its medical necessity, or itemized charges of the procedure. Employer denies having denied any requests for MRIs or blood tests and asserts they were not requested until after Claimant's penile surgery. It also maintains Claimant did not establish that the requested medical treatment was reasonable, necessary, or related to the 22 Jul 97 injury. Finally, Employer asserts that it has offered to provide Claimant medical care with Dr. Kushwaha or any other provider Claimant wants to treat his back, but that Claimant has chosen not to seek treatment.

Finally, Employer argues that the average weekly wage claimed by Claimant is incorrectly based on 54 weeks. Employer maintains that the average weekly wage calculation should be based on the exact 52 weeks or 26 pay periods prior to Claimant's injury for an average weekly wage of $817.64.

LAW

Nature and Extent of Disability

Once it is determined that he suffered a compensable injury, the burden of proving the nature and extent of his disability rests with the claimant.[7] Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

[7] *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980).

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment."[8] Therefore, for a claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown.[9] Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage-earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.[10] A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement.[11] Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature.[12]

The question of extent of disability is an economic as well as a medical concept.[13] To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury.[14]

A claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability.[15] Once a claimant is capable of performing his usual employment, he suffers no loss of wage-earning capacity and is no longer disabled under the Act.

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[8] 33 U.S.C. § 902(10).
[9] *Sproull*, 25 BRBS at 110.
[10] *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, *pet. for reh'g denied sub nom. Young & Co. v. Shea*, 404 F.2d 1059 (5th Cir. 1968) (per curiam), *cert. denied*, 394 U.S. 876 (1969); *SGS Control Services v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996).
[11] *Trask*, 17 BRBS at 60.
[12] *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984); *SGS Control Services*, 86 F.3d at 443.
[13] *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991).
[14] *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988); *Louisiana Insurance Guaranty Ass'n v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994).
[15] *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988).

Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment.[16] Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?[17]

Employers need not find specific jobs for a claimant; instead, they may simply demonstrate "the availability of general job openings in certain fields in the surrounding community."[18] Employers may meet their burden by first introducing evidence of suitable alternate employment at the hearing,[19] even though such evidence may be suspect and found to be not creditable.[20]

The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order to establish the claimant is physically and mentally capable of performing the work and that it is realistically available.[21] The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record.[22] A showing of only one job opportunity may suffice under appropriate circumstances.[23] Conversely, a showing of one unskilled job may not satisfy the employer's burden.

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[16] *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981).
[17] *Id*. at 1042.
[18] *P & M Crane Co. v. Hayes*, 930 F.2d 424, 431 (1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039 (5th Cir. 1992).
[19] *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236-37 n.7 (1985)
[20] *Diamond M Drilling Co.*, 577 F.2d at 1007 n.5
[21] *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1988).
[22] *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); s*ee generally, Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992); *Fox v. West State, Inc.*, 31 BRBS 118 (1997).
[23] *P & M Crane Co.*, 930 F.2d at 430.

Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful.[24] Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work."[25]

A showing of available suitable alternative employment may not be applied retroactively to the date the injured employee reached MMI. An injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available.[26] MMI "has no direct relevance to the question of whether a disability is total or partial, as the nature and extent of a disability require separate analysis."[27] "[I]t is the worker's inability to earn wages and the absence of alternative work that renders [him] totally disabled, not merely the degree of physical impairment."[28]

Any time an employer offers a claimant light duty work because of physical or mental inability to perform usual work duties, that light duty is tailored to the employee's physical limitations.[29] If the light duty is within a claimant's restrictions, then employer meets its burden of establishing suitable alternative employment.[30] Claimant cannot abandon work and then claim employer did not provide suitable alternative employment.[31]

To qualify as suitable alternative employment, the employer-offered job may be different than the original one and may involve light duties to accommodate the employee's injury.[32] The job may even be specifically tailored for the employee.[33] However, an offered job that is too physically demanding for the claimant to perform is not suitable alternate employment.[34] To qualify as suitable alternative employment, the job must accommodate all working conditions required by all physicians of record.[35]

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[24] *Turner*, 661 F.2d at 1042-1043; *P & M Crane Co.*, 930 F.2d at 430.
[25] *Turner*, 661 F.2d at 1038, *quoting Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003 (5th Cir. 1978).
[26] *Rinaldi*, 25 BRBS at 131.
[27] *Palumbo v. Director, OWCP*, 937 F.2d 70, 76 (2d Cir. 1991).
[28] *Id*.
[29] *Bryan v. Global Associates*, 1996 WL 454719 (DOL O.A.L.J.).
[30] *Id*.
[31] *Id*.; *see also generally, Darden*, 18 BRBS 224.
[32] *Walker v. Sun Shipbuilding*, 19 BRBS 171 (1986).
[33] *Darden*, 18 BRBS at 224.
[34] *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307 (1984).
[35] *Crum v. General Adjustment Bureau*, 738 F.2d 474 (D.C. Cir. 1984), 16 BRBS 101 (1983); s*ee also Poole v. National Steel & Shipbuilding Co.*, 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment); *Jameson v. Marine Terminals*, 10 BRBS 194 (1979) (offering to try employee in job not meeting medical restrictions is not suitable alternate employment).

Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings,[36] which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury.[37]

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage.[38] Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year.[39] But, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate.[40]

Subsections 10(a) and 10(b) both require a determination of an average daily wage to be multiplied by 300 days for a 6-day worker and by 260 days for a 5-day worker in order to determine average annual earnings.

A worker's average wage should be based on his earnings for the seven or eight weeks that he worked for the employer rather than on the entire prior year's earnings if a calculation based on the wages at the employment where he was injured would best adequately reflect a claimant's earning capacity at the time of the injury.[41]

Section 10(c) of the Act provides:

> If either [subsection 10(a) or 10(b)] cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and the employment in which [he] was working at the time of his injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.[42]

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[36] 33 U.S.C. § 910(a)-(c).
[37] *SGS Control Services*, 86 F.3d at 441; *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Barber v. Tri-State Terminals, Inc.*, 3 BRBS 244 (1976), *aff'd sum nom. Tri-State Terminals, Inc. v. Jesse*, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).
[38] 33 U.S.C. § 910(a).
[39] 33 U.S.C. § 910(b).
[40] *Empire United Stevedore v. Gatlin*, 935 F.2d 819, 821, 25 BRBS 26 (CRT) (5th Cir. 1991).
[41] *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981).
[42] 33 U.S.C. § 910(c).

The Administrative Law Judge has broad discretion in determining annual earning capacity under subsection 10(c).[43] The objective of subsection 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of his injury.[44] Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent, or discontinuous.[45] In calculating annual earning capacity under subsection 10(c), the Administrative Law Judge may consider: the actual earnings of the claimant at the time of injury,[46] the earnings of other employees of the same or similar class of employment,[47] claimant's earning capacity over a period of years prior to the injury,[48] multiply claimant's wage rate by a time variable,[49] all other sources of income,[50] overtime,[51] vacation and holiday pay,[52] probable future earnings of claimant,[53] or any fair and reasonable representation of the claimant's wage-earning capacity.[54]

Under subsection 10(c), the Administrative Law Judge must arrive at a figure which approximates an entire year of work (the average annual earnings).[55]

Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.[56]

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[43] *Hayes v. P & M Crane Co.*, 930 F.2d 424 (5th Cir. 1991); *Hicks v. Pacific Marine & Supply Co., Ltd.,* 14 BRBS 549 (1981).
[44] *See Barber*, 3 BRBS 244.
[45] *Gatlin*, 935 F.2d at 822.
[46] 33 U.S.C. § 910(c); *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 344-45 (1988).
[47] 33 U.S.C. § 910(c); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Hayes*, 23 BRBS at 393.
[48] *Konda v. Bethlehem Steel Corp.*, 5 BRBS 58 (1976) (all the earnings of all the years within that period must be taken into account).
[49] *Lozupone v. Stephano Lozupone & Sons*, 14 BRBS 462, 465 (1981); *Cummins v. Todd Shipyards Corp.,* 12 BRBS 283, 287 (1980). (if this method is used, must be one which reasonably represents the amount of work which normally would have been available to the claimant. *Matthews v. Mid-States Stevedoring Corp.*, 11 BRBS 509, 513 (1979)).
[50] *Harper v. Office Movers/E.I. Kane*, 19 BRBS 128, 130 (1986); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052, 1057 (1978).
[51] *Bury v. Joseph Smith & Sons*, 13 BRBS 694, 698 (1981); *Ward v. General Dynamics Corp.*, 9 BRBS 569 (1978).
[52] *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100 (1991).
[53] *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 321, 18 BRBS 100 (CRT) (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987); *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43, 12 BRBS 806 (CRT) (9th Cir. 1980); *Gilliam v. Addison Crane Co.*, 21 BRBS 91, 93 (1987).
[54] *See generally, Flanagan Stevedores, Inc. v. Gallagher and Director, OWCP*, 219 F.3d 426 (5th Cir. 2000).
[55] *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991); *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).
[56] 33 U.S.C. § 907(a).

An employer is liable for all medical expenses which are the natural and unavoidable result of a claimant's work injury. For medical expenses to be assessed against an employer, the expenses must be both reasonable and necessary.[57] Medical care must also be appropriate for the injury.[58]

A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.[59]

Section 7 does not require that an injury be economically disabling for a claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.[60] Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.[61]

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect, or refusal.[62] An emergency situation arises when a claimant is unable to make his own selection, such as unconsciousness or other similar incapacity.[63] Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury.[64] However, even if the medical care was reasonable and necessary, claimant is not entitled to reimbursement of medical expenses when he fails to seek preauthorization and there is no emergency, neglect, or refusal.[65]

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment.[66] Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care.[67] Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.[68]

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[57] *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979).
[58] 20 C.F.R. § 702.402.
[59] *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984).
[60] *Ballesteros*, 20 BRBS at 187.
[61] *Weber v. Seattle Crescent Container Corp.*, 19 BRBS 146 (1980); *Wendler v. American National Red Cross*, 23 BRBS 408, 414 (1990).
[62] *Schoen v. United States Chamber of Commerce*, 30 BRBS 103 (1997); *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), *rev'g* 6 BRBS 550 (1977); *Oberts v. McDonnell Douglas Services*, 39 BRBS 117, 138 (ALJ Jan. 18, 2005).
[63] *See* 20 C.F.R. § 702.405; *Bulone v. Universal Terminal & Stevedoring Corp.*, 8 BRBS 515, 517 (1978).
[64] *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294 (1988); *Rieche v. Tracor Marine*, 16 BRBS 272, 275 (1984).
[65] *See generally, Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999).
[66] *See generally*, 33 U.S.C. § 907(d)(1)(A).
[67] *Mattox .v Sun Shipbuilding & Dry Dock Co.*, 15 BRBS 162 (1982).
[68] *Id*.

EVIDENCE AND ANALYSIS

Testimonial and Medical Evidence

***Claimant testified live at trial and through deposition that*:**[69]

He is 52 years old. He graduated from high school, but did not have any formal education beyond that. Before working for Employer, Claimant worked as a welder's helper and pipefitter helper. He also worked at a saw mill, on a ranch as a cowboy, and on an oilfield. He started working for Employer in March 1980. He hooked up barges, ships and railcars, loaded trucks, climbed tanks, gauged barges, and dug holes. All of his jobs involved heavy labor. Claimant was in excellent health – he was skinny and strong. Before his injury, Claimant received treatment for bursitis in one of his shoulders. He worked without limitations prior to his 1997 injury.[70]

On 22 Jul 97 Claimant and another employee, Ray Lowe were hooking up a barge that did not fit in Employer's dock. They got an eight-inch rubber hose. All they had was an air winch and a sling, which was as high up as "they could get it and all this excess hose is hanging down." He and Mr. Lowe dragged the barge up. Mr. Lowe was about to tie it off while Claimant held the hose, when the barge surged back and jerked him. His "testicles went up in [his] stomach and [his] back hurt real bad." He sat down and yelled for about fifteen (15) minutes. His back was burning and he felt sick to his stomach, like he was going to throw up and pass out. The guys on the coastal barge came out and with the help of Mr. Lowe, they hooked it up. Claimant did not help.[71]

Claimant went into the change house because it was close to 11 o'clock and he works the three to eleven shift. Claimant told his foreman, Mike Williams, that he hurt himself and that he wanted to go home and lay down. He specifically told him that "my nuts hurt and my back hurts." He told Mr. Williams that he did not want to go to a doctor. The next day he sought medical treatment. He treated with Employer's doctor, Dr. Baker or Dr. Roth. The doctor told him his back was messed up. He was also told that he pulled a muscle in his back. X-rays were taken. Claimant received massages for his back and pain medication. He was sent back to work, but could not stay awake on his medication.[72]

Although Claimant returned to work at light duty, Employer would not honor Dr. Baker's restrictions. Claimant wanted to work light duty, but was scared because he hurt his back and had three kids to raise. He tried to hold onto his job. He continued working until sometime in May 1998. He started receiving workers' compensation after he quit, but was getting paid the wrong amount. He received $545.13 weekly until 27 Mar 05. At that time, his benefits were reduced to $325.08 per week.[73]

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[69] Tr. 18-46; EX-26.
[70] Tr. 18-19, 23-24; EX-26, pp. 8-12.
[71] Tr. 19-20.
[72] Tr. 20-21; EX-26, pp. 12-14.
[73] Tr. 21-22.

Dr. Baker prescribed pain medication and sent Claimant for physical therapy and a myelogram. He performed surgery on Claimant in August 1998. The surgery did not help Claimant and his back got worse. Dr. Baker started injecting Claimant with steroids before the surgery. Claimant went from 160 pounds to 240 pounds. At formal hearing, Claimant weighed 244 pounds. Dr. Baker gave him a series of three injections in his spine. After the first three series Claimant gained 20 pounds. Even though Claimant told Dr. Baker he did not like the injections, Dr. Baker told him he had to take them. Dr. Baker informed him that Employer would refuse medical treatment if Claimant did not get the injections. Dr. Baker had him sign a paper informing him that the injections "cause kidney failure, heart failure, liver failure, and sexual side affects." Dr. Baker did not inform him what the sexual side affects were. Claimant's penis shrunk "to where [he] had to squat to pee, and when [he] had an erection it was only two and a half inches long, and [he] almost blowed [sic] [his] brains out on account of it because [he] didn't want to live." [74]

When he told Dr. Baker about his problems, Dr. Baker responded that "the old wife ain't cracked up what she used to be." Claimant wanted to hit Dr. Baker. He walked out of the doctor's office. Claimant stopped seeing Dr. Baker because he did not like the way he made fun of him. He also stopped seeing Dr. Baker because the doctor made nationwide news for cutting "wrong limbs" and "drugs." Dr. Baker wanted to perform a second surgery, but Claimant would not let him.[75]

Claimant looked in the phone book and found a doctor who performed penile enlargements, Dr. Ringer. Claimant never contacted Employer for assistance in locating a doctor because Dr. Cherlo tried to get authorization for blood tests to see the medications effects on his kidneys and liver, but Employer constantly refused. In addition, it took Employer four years to approve the MRI. It was not until he went to Dr. Kushwaha that Employer approved the MRI. Claimant still has not received authorization for blood tests. Claimant has not seen a heart doctor either. Claimant believed this all happened before he sought a consultation with Dr. Ringer in 2001. Claimant felt there was no point asking for Employer's authorization to see Dr. Ringer since Employer constantly said no to other various treatments.[76]

He had a consultation with Dr. Ringer and was informed that he could charge the surgery to his credit cards. Dr. Ringer explained the procedure. He cut Claimant like a "V" or "Y," going down both sides. He cut "suspension ligaments" and used his hand to pull it forward. He then shot fat in it to build it up. After Dr. Ringer pulled it forward, he put a mesh to stop it from sucking back up. Claimant had to wear tights for a long time after the surgery. Dr. Ringer told him that it would take a while, but the penis would stretch. On 27 Mar 01, Claimant underwent the penile enlargement surgery and it worked. His penis is back to functionality. Claimant is "back to [being] a man but it hurts . . . to . . . make love to [his] wife." He has a lot of scar tissue. Claimant paid $7,000 for the surgery. He charged $6,300 and paid $700 in cash. Claimant does not have any written reports from Dr. Ringer. He only has his credit card receipt.[77]

[74] Tr. 22-25; EX-26, pp. 16, 19.
[75] Tr. 22-25; EX-26, p. 16.
[76] Tr. 25, 37-39, 42-44; EX-26, p. 17.
[77] Tr. 25-27, 37-39; EX-26, p. 18.

Claimant has penile scars from the surgery with Dr. Ringer. Claimant believes the surgery was an emergency situation. He was having problems with his wife and thought he would lose her. He would not explain himself other than he did not "want to live this way anyway." "If [he could not] be a man [he] was going to kill [himself]." Claimant would not be sitting in the formal hearing if he did not have the surgery.[78]

After his work-related injury, Claimant "worried to death what [he was] going to do." Dr. Schwartz hurt Claimant's back every time he treated him. Dr. Schwartz worked with Dr. Baker in the same office. Dr. Schwartz prescribed Zoloft. Claimant has continuously taken antidepressants since Dr. Schwartz's initial prescription. Employer paid for his medications, including his heart medication. Ever since the steroid injections, Claimant has had heart problems. He had four heart attacks. He had a heart attack while he was in Dr. Ringer's office. Claimant cannot find Dr. Ringer. Dr. Ringer has malpractice lawsuits pending against him for performed plastic surgeries. Claimant adamantly believes that Dr. Ringer did a good job on him and he could not complain. Dr. Ringer helped him.[79]

Claimant did not have heart problems, high blood pressure or hypertension prior to his 22 Jul 97 injury. He never took medications for his heart prior to his injury. He started having heart problems after his back surgery. He went to Dr. Barnett because of continuous coughing. Dr. Barnett checked Claimant's blood pressure and it was racing at about 120 beats per minute. Claimant informed Dr. Barnett about the steroid injections and Dr. Barnett responded, "Steroids will do that to you." Dr. Barnett prescribed heart medication, which Claimant still takes every night. He also has a gauge to check his blood pressure and heart rate. Dr. Barnett recently passed away. Claimant wants Employer to pay for treatment with a heart doctor because the steroids and Vioxx caused his heart problems. He has not seen a doctor for his heart yet.[80]

Claimant takes a pain medication, muscle relaxant, and antidepressant. He also takes nitro-glycerin pills. He carries them around with him because his heart acts up a lot. His pain medication is Hydrocodone, but his doctor recently prescribed generic time release patches to relieve pain. The patches are supposed to release the pain medication for three days per patch. The patch made him ill. His face swelled up and he got dark circles under his eyes. It also caused him to throw up and have a severe headache. It did help with his back pain. When he returned to his doctor a week after trying the pain patch, the doctor told him the generic patches were killing people and he prescribed a name brand patch. Claimant tried the name brand patch, but it also made him sick to his stomach and gave him a bad headache. He returned to his doctor the same day and they checked his blood pressure. Claimant's blood pressure was low when he sat, but as soon as he stood his blood pressure went sky high. The doctor wanted Claimant to continue using the patches, but after another day of terrible headaches Claimant told the doctor that he could not take the patches anymore. He did not want to become a dope addict either.[81]

[78] Tr. 39-41.
[79] Tr. 27-28.
[80] Tr. 29-30; EX-26, p. 20.
[81] Tr. 30-31; EX-26, pp. 5-6.

A typical day for Claimant consists of sitting and laying down a lot. He spends most of his time at Centerville with his wife. His wife works outside and Claimant tries to raise crappies. He also sets traps for mud cats. They cannot get rid of them. Claimant fishes sometimes, but considers trapping the mud cats fishing as well. Most of the fish in the pond are about four or five inches. He has memory problems and cannot remember peoples' names.[82]

Claimant stays up most of the night because his back hurts. The pain radiates down his butt and both legs. It used to only be his left leg, but his condition has worsened because of his large weight gain. Claimant will go for days without sleep. After a few days he gets "plumb exhausted and fall[s] asleep." Claimant admitted having good and bad days, but they were never predictable. He has problems holding his granddaughter who weighs 21 pounds. When Claimant has a lot of pain he takes his pain medication and tries to lie down. He props something under his feet, which helps him get his legs up.[83]

He has not worked for the last eight years. Since he left Employer, he has not applied for any jobs.[84]

Claimant recalled meeting with the vocational expert, Mr. Quintanilla. Mr. Quintanilla interviewed Claimant about his work history and medications. He denied seeing Mr. Quintanilla's reports. He did not apply for any of the jobs listed in Mr. Quintanilla's reports.[85]

Upon recommendation from his and Employer's counsel, Claimant treated with Dr. Kushwaha for back pain. An MRI was performed before he saw Dr. Kushwaha. Dr. Kushwaha explained Claimant's choices for treatment. Dr. Kushwaha did not think surgery would relieve his pain because he would have to take the hip bone out and fuse Claimant's back. Dr. Kushwaha explained to Claimant that he would not be able to move around as good and he could not guarantee the surgery would relieve the pain. Claimant told Dr. Kushwaha that "Well [he would] just live with it." Dr. Kushwaha told him to keep doing what he was doing and ordered him off work indefinitely. Claimant understood that Employer agrees that he could return for any type of treatment (including surgery) with Dr. Kushwaha.[86]

Dr. Cherlo prescribes his medications. He sees Dr. Cherlo about once a month. Claimant saw him more often while taking the pain patches. Claimant did not return to Dr. Cherlo because he stopped taking the patch and went back to his original medications. Claimant does not think Dr. Cherlo performs back surgery. He wants a recommendation for a good back surgeon.[87]

[82] Tr. 31-32, 36; EX-26, pp. 22-26.
[83] Tr. 32-33; EX-26, pp. 22-26.
[84] Tr. 33-34.
[85] Tr. 34-35.
[86] Tr. 35-36, 39.
[87] Tr. 36-37; EX-26, pp. 29-30.

Dr. Basi is the same type of doctor as Dr. Cherlo. He takes workers' compensation and is not a surgeon. Dr. Basi wanted to send Claimant to Galveston, but Claimant told him if Carrier would not pay for it, then he would not go. Dr. Basi made Claimant sign a paper stating that if he fell "over dead outside that [his] wife won't sue him." Dr. Basi told Claimant that he "was going to drop dead with [his] heart." Dr. Basi works with Dr. Cherlo and if Dr. Cherlo is not in, then he sees Dr. Basi. They work in the same office and Claimant sees both.[88]

Claimant wants his back fixed. He understands that medication will not fix his problem and is just a temporary relief. He does not want to take anymore steroids and believes any surgery will involve steroids. He is worried that if he gets more steroid injections the shrinkage will return and he will not have a doctor to fix him since Dr. Ringer had a brain aneurism. He does not want to go through that again. If he could have surgery and recover without steroids, he would have the surgery. He does not want to have the pain or muscle spasms anymore. He also wants to stop taking medication.[89]

***Lisa Dover testified live at trial that*:**[90]

She has been married to Claimant for 28 years. Prior to his work-related accident on 22 Jul 97, Claimant was always in excellent health.[91] He was never depressed and was always in good spirits and fun to be around. Claimant was proud of his work with Employer.[92]

Claimant never had heart problems before his work accident. His heart problems did not start until after his surgery. His first heart attack was around July 1999. He had a second heart attack when he went to Dr. Ringer. The heart problems started after Claimant's course of steroid treatments. She tried to talk him out of the steroid injections, but Claimant told her he had to get them to get better and go back to work.[93]

Claimant gained a lot of weight since his 22 Jul 97 accident. After he gained 50 pounds, one of his doctors said he had to do something about his weight because it would just make him worse. Mrs. Dover started walking with Claimant. He dropped the weight for a while, but then he started having heart problems and the weight returned.[94]

Before the penile surgery, Claimant was in a desperate psychological state. They had marital problems and were very close to getting a divorce. She could not handle the stress Claimant put her under. Claimant went into such a state of depression that he left their home with nothing but a gun. He did not return until five days later. Claimant told her that he went to

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[88] Tr. 36-37.
[89] EX-26, pp. 28-29.
[90] Tr. 46-63.
[91] Mrs. Dover provided examples of how Claimant was in good health prior to his work-related accident, including taking care of their ranch. After working a full shift, Claimant drove eight to ten hours to their ranch and then walked for hours. He also hunted and used "brute force to hang a deer" and skin it by himself. Mrs. Dover testified she could not keep up with him before his work-related accident.
[92] Tr. 46-48.
[93] Tr. 47-49.
[94] Tr. 49.

one of their ranches and tried to kill himself because he could not live like this anymore. The surgery with Dr. Ringer helped restore their sexual life and marriage. It helped Claimant's mindset because "he felt whole again." Claimant still deals with chronic depression. When Claimant takes the antidepressant medication, Zoloft, he is almost normal. They laugh and joke – they get on with their lives. Claimant does not like to take the Zoloft, but she makes him take it. When he does, she gets her husband back[95]

Claimant tries to avoid taking his pain medication, Hydrocodone, every day. He takes it about every other day. His pain medication causes migraines. He needs to lie down after taking them and also gets violently ill on his medication. He has the same reaction from the hydrocodone as he does from the morphine patches. In the winter his pain is the worst. When there is a cold front Claimant will only get out of bed to use the restroom and shower, then he goes back to bed. Sometimes Claimant is in bed for a week. Mrs. Dover helps him out of bed during those times. Claimant started using a cane because after he gained weight Mrs. Dover could not lift him anymore. She learned how to lift him by working in a nursing home. Although she was in housekeeping, the CNAs would ask for her help lifting an invalid patient. They taught her how to lift without hurting herself. When he got to be 240 pounds, he learned how to use the cane to pull himself up.[96]

Mrs. Dover does not think Claimant could get or keep a steady job. When he drives in traffic his back tenses up. He always used to drive, but now she does even though there is "nothing on this earth [that she] hate[s] more than that." In addition, she does not see how he can take his pain medication and work at the same time. Claimant is also very behind technologically. She tried teaching him to retrieve voicemail, but he gets so aggravated he just slams the phone down. Finally, Claimant is inconsistent. He does not have a routine. He does not get up or go to sleep at the same time everyday because of his pain. He flops around throughout the night, then after five days of not sleeping, he will finally go to sleep. She tries not to disturb him and turns off the phones.[97]

Claimant and Mrs. Dover own several ranches. They used to go to the ranches quite a bit, but after he hurt himself it hurt him too much to ride in a car that far. Now they only go about two times per year. They stay until both of them kill two bucks. They do not lease any of their ranches to other deer hunters. Their boys also hunt. They usually go hunting for one week. Claimant will kill two bucks right away and is then ready to go home. He lies down at the cabin and takes care of their Chihuahua. She usually hunts twice a day, whereas Claimant tends to hunt in the afternoon and typically sleeps in. None of their ranches have cattle on them. The first ranch bought and paid for is Pumpville. It is 324 acres about 15 miles west of Langtry, Texas. They next bought the Langtry Ranch which is about four miles east of Langtry. It is about 161 acres. They also have "one mile of road frontage on Highway 90" which is easily

[95] Tr. 49-50, 61.
[96] Tr. 51, 61.
[97] Tr. 52-53.

accessible and has a cabin and electricity. Before Claimant's work-related accident, they bought a 100 acre ranch in Val Verde County, north of Del Rio. After Claimant was hurt, they could not afford to pay for the Val Verde Ranch so they sold it. About three years ago they bought 14 ½ acres in Leon County. They want to retire there. Mrs. Dover does all the maintenance work on the ranches, including hauling the water.[98]

Claimant tried to see every doctor in the Cleveland area, but after they found out that Dr. Baker operated on him, he could not get appointments. Now, he does not want to see any doctors because he is "fed up with the whole medical community." If a doctor could help him reduce his medication, Claimant might be interested in seeing him because he does not like taking medication. He has not asked for that from anybody. He has not recently asked for another doctor.[99]

Even though she does not have any formal medical training, Mrs. Dover knows when her husband's back is knotted up. She can look at him and know exactly where Claimant is hurting. She knows when he is inflamed. One week before the hearing Claimant could hardly walk because his right leg hurt. She has advised Claimant that he "really need[s] to double up on those anti-inflammatories." He did and now he can walk.[100]

She understood Dr. Kushwaha does not want Claimant lifting more than 10-15 pounds. She realized their granddaughter weighed more than Claimant's lifting restriction when Claimant looked at her and said "I can't hold her." Claimant and Mrs. Dover did not know about the lifting restriction until after Claimant held his granddaughter. Claimant was originally restricted from lifting more than 25 pounds. Claimant's restrictions have gotten more restrictive over time.[101]

Even though Mrs. Dover gets Claimant into windows where he is "almost" normal, she does not think he can work because he still takes his medications and has bad days. Claimant's condition is very unpredictable and she never knows from one day to the next how bad he will be hurting, regardless of his medications. The Zoloft may help with his depression, but it does not help his pain.[102]

Claimant has always been able to take a lot of pain. After Claimant injured his back, he told her "they're going to make [him] better, they're going to make the pain go away, and they're going to fix [his] back and [he'll] be working." Mrs. Dover knew then that Claimant would never work again.[103]

[98] Tr. 53-58.
[99] Tr. 55-56
[100] Tr. 58-59.
[101] Tr. 59-60.
[102] Tr. 61-62.
[103] Tr. 62-63.

Dr. Baker told Claimant that he would be able to return to work a short time after the surgery. Claimant had problems waking up from the anesthesia. Dr. Baker told her that he was going to do a fusion and he put a clamp in Claimant's spine. For many years they thought Claimant had a clamp in his spine, but he did not. Dr. Baker told them that in "twelve days" Claimant would return to work. Mrs. Dover did not believe Dr. Baker and told Claimant that there was no way he would be able to return to work because he had staples in his back and the incision would not be ready for him to return to work. Claimant believed Dr. Baker and told her he would return to work in 12 days.[104]

***Dr. Vivek P. Kushwaha testified via deposition that*:[105]**

He is a board-certified orthopedic surgeon and is currently Chief of Spine Service of the UT Department of Orthopedics and Hermann Hospital. He saw Claimant per Employer's request on two separate occasions. Employer provided him with Claimant's medical records to review prior to his own examination. Claimant first saw Dr. Kushwaha on 08 Feb 05. Claimant's medical condition prevented Claimant from returning to work as of 08 Feb 05 through at least 08 May 05.[106] He later continued Claimant's no work status from 30 Mar 05 through 30 Jun 05.[107] Claimant informed Dr. Kushwaha that he had the pain for several years, but that it progressively worsened since his 1998 surgery with Dr. Baker. Claimant had back and left leg pain with some numbness and tingling in his leg. At the time of his examination, Claimant had injections, physical therapy, and required a cane to ambulate. He had a positive straight leg raise with decreased range of motion in his back. His x-rays showed some disc space narrowing at L5-S1 with evidence of a previous surgery. Dr. Kushwaha ordered an MRI to further evaluate Claimant's back and told Claimant to return for a follow-up.[108]

Claimant returned to Dr. Kushwaha for treatment on 30 Mar 05. The MRI showed problems at the site of his previous surgery and the level above where he had some retrolisthesis at L4-5. Retrolisthesis is a sign of instability. Claimant also had some disc herniation and stenosis at L4-5. Claimant has had this pain for a long time and also underwent therapy and injections. Claimant was maximized in treatment of that nature. Claimant's options were to see if he could live with his symptoms because it is not a life-threatening condition (it is a matter of function and pain) or to try to improve the situation with surgery. The surgery would have "to be more than what he had done before." It would have to be both a revision decompression and fusion.[109]

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[104] Tr. 63.
[105] EX-30.
[106] CX-1, p. 106; EX-27, p. 3.
[107] EX-27, p. 7.
[108] EX-30, pp. 5-7; EX-27, pp. 1-2.
[109] EX-30, pp. 7-8; EX-27, pp. 4-6.

Dr. Kushwaha performs a lot of surgery. When he does a lumbar fusion, his goal is to make sure the patient gets better. The worse off the patient is prior to surgery, the more likely they will get better after. He always tries to encourage his patients to live with the pain as much as they can before considering surgery. After Claimant discussed his options with Dr. Kushwaha, Claimant decided he would try to live with his pain and would return for treatment if it got to a point where he could not live with it anymore.[110]

Dr. Kushwaha reviewed Claimant's medications. He took antidepressants, hypertensive medication, pain medication, and muscle relaxers. Dr. Kushwaha did not have a sense of how may pills Claimant took per day, but stated that it was "normal for his kind of problems to need occasional pain medication or a muscle relaxer – or not unusual." Dr. Kushwaha did not adjust Claimant's medications and did not think he prescribed Claimant any medications, at least not on a regular basis.[111]

Although Dr. Kushwaha did not know how much pain medication Claimant took, he opined that Claimant is probably limited to sedentary or light type work. He believed it was "certainly possible" for Claimant to work eight hour days. He had many patients with the same problems as Claimant who could work before and after surgery. His main concern is whether Claimant took a lot of pain medication, i.e. if he took eight or ten pain pills a day, it would make it difficult for him to work. If Claimant takes that many pills per day, then he "needs to think about having something more done." If Claimant is moderate with his pain medication, Dr. Kushwaha believes he could work. He opined Claimant could work eight hours a day for sitting, but he is limited. With most people with back instability and stenosis, Dr. Kushwaha recommends they limit their sitting to one hour at a time. As to walking and standing, Dr. Kushwaha limited Claimant to 30 minutes to one hour at a time. Claimant is "not really limited" regarding reaching. Claimant should avoid twisting. Claimant can operate a motor vehicle and his wrists and elbows are fine. Claimant is limited to pushing less than 15 pounds and pulling less than 10 to 15 pounds. He is also limited to lifting less than 10 to 15 pounds. Claimant's ability to squat, kneel, and climb are also limited. He would be fine with normal breaks every four hours. Dr. Kushwaha opined that Claimant could do most office type work because he could control his activity.[112]

Dr. Kushwaha reviewed both Labor Market Surveys which identified light or sedentary jobs. He believed Claimant could work at all the positions identified in the Labor Market Surveys, including a computer assembler or security guard.[113]

The results of surgery are better with fewer prior surgeries. Claimant has been a cooperative and straightforward patient.[114]

[110] EX-30, pp. 8-9; EX-27, p. 6.
[111] EX-30, pp. 9-10.
[112] EX-30, pp. 11-13.
[113] EX-30, p. 14.
[114] EX-30, pp. 15-16.

William L. Quintanilla testified live at trial that:[115]

He has been a vocational rehabilitation counselor in the private sector for about thirty years. He interviewed Claimant upon Employer's request on 06 Dec 04. He reviewed all of Claimant's records, including his medications. Based upon his interview of Claimant and review of all the records, Mr. Quintanilla prepared the Labor Market Survey[116] dated 13 Jan 05.[117]

After meeting with Claimant, Mr. Quintanilla knew Claimant could not return to his usual work because his job was heavy. Since that is the only type of work Claimant had done, the only alternative was to place him in entry-level unskilled type work. The Labor Market Survey lists jobs that fall within the light to sedentary levels of work. "The most ideal job for an individual who has his type of back condition is a light job." In his opinion, a sedentary job does not allow for sitting for long periods of time. Therefore, the most ideal job for a person with back surgery and limitations like Claimant's, is a light job with alternating sitting, standing, and walking. In most cases, no lifting is required.[118]

The Labor Market Survey of 13 Jan 05[119] identified a computer assembly job that paid $7.00 per hour and was considered light work. Mr. Quintanilla also found two non-commissioned security guard positions. The security guard positions would require him to be a "gate tender," just letting people in and out of the building. The security guard positions paid $8.25 and $6.50 per hour. Mr. Quintanilla felt these jobs were most appropriate for Claimant, taking into account his medical restrictions and limitations.[120]

Employer asked Mr. Quintanilla to update the Labor Market Survey,[121] which he did on 15 Aug 05. There is no real difference between the two Labor Market Surveys except that there were a multiple number of jobs in the security field. Mr. Quintanilla reiterated his position that Claimant needs a job where he could alternate between sitting, standing, and walking. There was a job with Armadillo Security Services as a non-commissioned security guard at $7.25 per hour. There was another job with Templar Protective Services also as a non-commissioned security guard at $8.00 per hour. A non-commissioned security guard position with Intertec Security Group paid $7.00 to $7.50 per hour, with Champion Security $7.00 per hour, and with Stealth Security Services $6.00 to $8.00 per hour. He also found a position as a general assembly operator for Welsh Technologies, Inc. at $6.00 to $7.00 per hour. They make padlocks and protective hardware at Welsh Technologies. As of the formal hearing, there are many available jobs in the security field. Many of the employers have part-time jobs. Claimant could work 20-hours per week, three or four hours in the evening.[122]

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[115] Tr. 64-79.
[116] EX-17.
[117] Tr. 64-66.
[118] Tr. 66-67.
[119] EX-17.
[120] Tr. 67-68.
[121] EX-29 (an updated Labor Market Survey dated 15 Aug 05).
[122] Tr. 68-69, 74.

Based on Dr. Likover's report stating Claimant had no restrictions, Mr. Quintanilla also located a welder's job and a soldering technician position. Even though Dr. Likover did not place restrictions on Claimant, Mr. Quintanilla agreed that "the light, alternative sit, stand, walk would be the way to go at the time that he returned back to work." According to Mr. Quintanilla, the security positions and assembly type jobs would be the most ideal jobs for Claimant.[123]

Mr. Quintanilla reviewed the restrictions Dr. Kushwaha placed on Claimant after the second Labor Market Survey. None of the restrictions disqualified Claimant from the light jobs identified in the Labor Market Surveys. Mr. Quintanilla took all of Claimant's medications into consideration. Mr. Quintanilla is "very familiar" with the types of medication Claimant takes. "There were no restrictions anywhere about any of the medications in the reports from the doctors, the restrictions that they felt are all within the guidelines of the jobs, and, so, therefore they would fit according to the doctor's prescriptions." When people complain about their medications causing problems, he suggests they go back to their physicians and ask for something different. Nothing in the record shows Claimant had difficulty talking to his doctors. The doctor needs to know about the types of problems the medications cause to prescribe something different. As to depression, getting back to gainful employment or activity of any type helps improve a person's condition as related to depression. There was also no work restrictions related to Claimant's depression. Since Zoloft helps Claimant he needs to stay on that particular medication. Medications are prescribed by physicians for a reason, to help. If Claimant's Medications are not helping, he needs to go back to his doctors to find something better.[124]

People with Claimant's conditions are never going to be perfect. There are days that Claimant will not have any pain, but there are going to be bad days. There are many people in today's workforce that are injured with back and other problems. Those people are able to work with pain up to a point they can handle. People have good and bad days all the time, but they still work with the help of medication. As such, he believes that Claimant "could give a good, good try [at working.] [He] should give it an effort and see [how] that works out for him."[125]

Dependability, as in showing up for work everyday, is essential in keeping a job. If Claimant had constant days where he needed bed-rest, which precluded him from going to work on a daily basis, then some employers would complain. Mr. Quintanilla, however, felt that if Claimant took proper medication he could "live as full a lifestyle as he could." An adjustment in medication can always be done, but not taking the medication at all does not help. Claimant needs to find medication that is consistent with his personal use and does not give him the problems he reports. Claimant should also try pain management. Based on what the doctors have said Claimant can do the jobs listed in the Labor Market Surveys. Mr. Quintanilla is not a medical doctor and has to depend on the doctor's restrictions and limitations when producing different jobs within those restrictions, according to Claimant's physical and mental abilities. [126]

[123] Tr. 69.
[124] Tr. 69-72, 76-77.
[125] Tr. 72.
[126] Tr. 73-76.

Mr. Quintanilla did not read Dr. Kushwaha's deposition and was not present during his deposition. He did not know whether Dr. Kushwaha had concerns about how pain or pain medication interacted with Claimant's ability to work. Since he is not a medical doctor, he does not know how pain medications could be effectively altered or if a pain management problem could effectively put Claimant in a better condition. Mr. Quintanilla deferred to Claimant's medical doctors.[127]

Dr. Max Roth's medical records provide in pertinent part:[128]

Dr. Roth examined Claimant on several occasions, dispensed medication, ordered "heat at home," and provided physical therapy. He returned Claimant to return to work on 07 Aug 97 on light duty with restrictions. His restrictions included no excessive walking, prolonged standing, or ladder climbing. He also restricted Claimant from lifting more than 25 pounds or repetitive bending, stooping, pushing, pulling, or lifting above shoulder level. Dr. Roth continued these restrictions on Claimant's follow-up visits on 11, 15, and 18 Aug 97. On 18 Aug 97, Dr. Roth discharged Claimant from his care and referred Claimant to a specialist near his home for further medical care.

Dr. Merrimon W. Baker's medical records provided in pertinent part:[129]

Claimant started treating with Dr. Baker on 01 Sep 97 for lumbar sciatic. Dr. Baker took Claimant off work until rechecked. He diagnosed Claimant with left SI joint dysfunction, left leg sciatica, left sciatic notch tenderness, positive straight leg raise on left and lumbar disc herniation. Claimant complained of lower back pain with radiation into his left buttock area. Dr. Baker kept Claimant off work because of "(1) risk of re-injury and (2) aggravation of injury (including increased pain) secondary to a 1 ½ hour drive each way to work."[130]

Claimant remained off work until 24 Oct 97, when Dr. Baker returned him to work on light duty with limited bending, stooping, and lifting of no more than 25 pounds. On 04 Dec 97, based on Claimant's lumbar herniation, Dr. Baker changed the restriction to no lifting more than 30 pounds.[131]

Claimant received medical treatment from Dr. Baker from 02 Sep 97 through 23 Oct 97 with a "no work" restriction. Claimant returned to light duty on 24 Oct 97, but was taken out of work again on 07 May 98. Claimant suffered a reoccurrence of his 22 Jul 97 job injury on 07 May 98. Dr. Baker advised Claimant to discontinue work until rechecked.[132]

[127] Tr. 78.
[128] CX-1, pp. 4-8.
[129] CX-1.
[130] CX-1, pp. 9-10, 13, 19.
[131] CX-1, pp. 23-24.
[132] CX-1, pp. 25-29.

Dr. Baker performed spinal surgery – a two level lumbar decompression at L4-5 and L5-S1 due to lateral gutter stenosis at both L4-5 and L5-S1. Claimant returned for follow-up treatment on 27 Aug 98. Dr. Baker kept Claimant off work and started outpatient therapy. Against Dr. Baker's advice, Carrier took Claimant's cold therapy unit away which was "not in his best interest and could delay his healing time." As of 09 Mar 98, claimant could sit for four hours, stand and walk for eight hours, and lift, bend, squat, climb, kneel, and twist for one hour.[133]

Claimant received continued physical therapy, but around 09 Jan 99, he started having slight increase in left leg pain. Claimant exhibited degenerative findings at L4-5 and L5-S1. Dr. Baker ordered Claimant to continue wearing his TENS unit, perform his exercises, and continue his medications. Claimant returned for a follow-up on 15 Feb 99. He had persistent paraspinal pain on his left side with significant spasm. Dr. Baker sent Claimant for a consultation and lower extremity EMG/NCV with Dr. Cherches. Dr. Baker also placed Claimant on antidepressants on 15 Feb 99.[134]

Claimant followed-up with Dr. Baker eight months after his lumbar laminectomy. He had continued complaints of low back and left hip pain. His back usually starts hurting after he picks something up or uses his back too much in physical therapy. Claimant told Dr. Baker he was not responding well to physical therapy because it caused him increased pain. Claimant continued to use his TENS unit daily, which he admitted helped. Claimant told Dr. Baker that his medication did not really help, but although Dr. Baker stated they "could need change," he did not change Claimant's medications. Claimant told Dr. Baker he asked to return to work at light duty, but Employer told him there was no light duty work available. At least Claimant did not have numbness or tingling in his legs anymore.[135]

Claimant returned for another follow-up with Dr. Baker on 19 Apr 99. He again asked to be released to return to work. This time, Claimant informed Dr. Baker his medications were okay. Even though he released Claimant to return to work, Dr. Baker noted Claimant was evaluated by Dr. Cherches who suggested the addition of Neurontin and a repeat myelogram and post-myelographic CT scan if Claimant's pain persisted. Regardless of Dr. Cherches' recommendations, Dr. Baker released Claimant to return to work on 20 Apr 99 with no lifting over 25 pounds and no repetitive bending or stoops.[136]

[133] CX-1, pp. 34-35, 46-47; EX-24.
[134] CX-1, p. 48.
[135] CX-1, p. 50.
[136] CX-1, pp. 50, 53-54, 77.

Claimant attempted to return to work, but nothing was available. Dr. Baker took him off work status on 03 Jun 99. Dr. Baker suggested Claimant continue with work conditioning until he reaches a point where he can perform his normal duties. Claimant had some improvement with the Neurontin, but still had persistent leg pain. Dr. Baker ordered continued exercises and medications. Claimant informed Dr. Baker that he still has lower back and left pain, as well as muscle spasms. Claimant also told Dr. Baker he walks about one mile daily. Dr. Baker took x-rays to determine Claimant's condition one-year status post lumbar laminectomy.[137]

Claimant returned to Dr. Baker for a follow-up and complained of increased pain in his left leg, worse with coughing and sneezing, and worse with sitting for extended periods. Claimant also complained that the pain radiates into the posterior thigh and into his calf and anterior aspects of his foot. Examination revealed "diminished left Achilles reflex, but no motor or sensory deficit noted." Dr. Baker started Claimant on lumbar epidural steroid injections on 31 Aug 99. He "placed [Claimant] on a high dose steroid step down program along with appropriate physical therapy." Claimant appeared to tolerate and "significantly improved after" the initial steroid injection and received a second injection on 09 Sep 99. He received the third injection on 15 Sep 99.[138]

By 17 Nov 99, Claimant's pain in his back and leg worsened. Claimant also had a 40 pound weight gain. Dr. Baker prescribed Fastin and suggested Claimant "do best to try and diet and progressively increase his activities." Claimant became agitated upon physical examination which revealed tenderness in his left lower lumbar region. Dr. Baker continued Claimant's exercise regimen and medications. Claimant had increased muscle spasms and numbness. His pain increased with activity and he continued to have weight gain. Dr. Baker gave Claimant "trigger point injection in the left paraspinal region at approximately L1." He also gave Claimant a prescription to Fastin and Xenical to aid in his weight loss and told Claimant he needed to continue his anti-hypertensive medications on a regular basis.[139]

Claimant continued taking his medications, but his pain did not go away. He returned to Dr. Baker on 26 Jan 00 and 29 Feb 00 with no improvement. As of 29 Feb 00, Claimant remained on "no work" status.[140] Claimant was supposed to have a second back surgery on 29 Mar 00, but he backed out of the surgery.[141]

[137] CX-1, pp. 55, 77.
[138] CX-1, pp. 78-80.
[139] CX-1, p. 81.
[140] EX-25, p. 25.
[141] CX-1, pp. 81-85.

River Oaks Imaging and Diagnostic's medical records provide:[142]

On 15 Oct 97, a lumbar myelogram was performed. Claimant has "mild ventral dorsal extradural defects noted at L4-5. There is mild peripheral underfilling of both L5 dural nerve root sleeves, more prominent on the right than on the left." In addition, "the L5-S1 ventral epidural space is patulous and is therefore insensitive." A computed tomography of the lumbar spine followed the myelography and resulted in findings that:

1. At L1-2, mild bilateral facet osteoarthropahy is present. At L2-3 and L3-4, there is minimal annular bulging and mild bilateral facet osteoarthropathy and ligamentous bypertrophy.

2. At L4-5, a 3 mm broad-based posterior protrusion is present, causing mild concavity of the ventral thecal sac. Mild bilateral facet osteoarthropathy and moderate bilateral ligamentous hypertrophy are present and, in association with broad-based posterior protrusion, cause moderate bilateral lateral recess narrowing at the level of the proximal L5 roots, worse on the right than the left. Mild peripheral underfilling of the right L5 dural nerve root sleeve is seen on both the myelogram and the post-myelogram CT scan. Mild anterior spondylosis and small chronic anterior protrusion are present.

3. At L5-S1, a 33 mm broad-based posterior central protrusion is present. The ventral epidural space is patulous and therefore the protrusion does not contact the ventral thecal sac nor the proximal S1 roots. Mild to moderate bilateral facet osteoarthropathy and mild bilateral ligamentous hypertrophy are present.

4. Mild right sacroiliac joint degenerative change is seen.

5. At L4-5, there is a broad-based 3 mm posterior protrusion which is associated with mild bilateral facet osteoarthropathy and moderate bilateral ligamentous hypertrophy. Moderate bilateral lateral recess narrowing is present at the level of the proximal L5 roots, worse on the right than the left, with peripheral underfilling of the right L5 dural nerve root sleeve.

6. At L5-S1, 3 mm posterocentral protrusion is present. There is no contract with the ventral thecal sac nor the proximal S1 roots. Mild to moderate bilateral facet osteoarthropathy is seen.[143]

[142] CX-1, pp. 20-22.
[143] CX-1, pp. 20-22.

On 10 Jun 98, L4-5 and L5-S1 lumbar discographies were performed. There was a very small protrusion and "significant intact overlying annular fibers" at L4-5. Claimant did not report provocative pain or pressure during the injection at L4-5. The injection at L5-S1 revealed an anterior bulge and a small posterior protrusion with minimal posterior annular fissure. Again, Claimant had no provocative pain or pressure during the injection.[144]

A post-discographic CT was also performed. It revealed small protrusions with significant intact overlying annular fibers. Mild facet osteoarthropathy was noted bilaterally. It also showed moderate bilateral lateral recess narrowing at L4-5 at the level of the proximal L5 roots.[145]

Dr. David Howie's medical report provides in pertinent part:[146]

On 17 Jul 98, Dr. Howie examined Claimant for an independent medical examination (IME) at Employer's request. Claimant gave a detailed history that he was injured while lifting a rubber hose for Employer. Claimant sought treatment within one week of his injury and was told he had a simple strain. Within a few weeks he developed left leg sciatica. At the IME, Claimant complained of pain in his spine, lower left back, left hip and leg. He described the pain as sharp – from throbbing to dull and shooting. He also complained of numbness in his left leg. Dr. Howie reviewed Claimant's medical records and performed a physical examination.[147]

Physical examination revealed a slightly overweight male. Claimant appeared comfortable and arose without hesitation or support. Claimant did not use utilize ambulatory aids. Dr. Howie did not notice any swelling, but there was some muscle spasm and tenderness present. There were no real trigger points. Claimant's sciatic notches were mildly tender, but they did not produce any real trigger phenomenon. Claimant's sacroiliac joints were also mildly tender. Claimant had slight apprehension in his back, but was able to clear through mid stance and maintain a lifted toe position. Dr. Howie found positive objective findings, including markedly positive straight leg raising test on his left, persistent lumbar muscle spasm, and tenderness and weakness of the long toe flexors on the left. As of 30 Jul 98, Claimant did not reach MMI and Dr. Howie concurred with Dr. Baker that a posterior decompression was warranted.[148]

Physical Therapy Plus' records reveal:[149]

Claimant received continued physical therapy treatment, including moist heat, soft tissue mobilization, and rehabilitation program. He received treatment about three times per week. On 10 Mar 99, the physical therapist noted that Claimant was not responding well to rehabilitation and continued to complain of lower and left mid back pain.[150]

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[144] CX-1, pp. 32-33.
[145] CX-1, p. 33.
[146] CX-1, pp. 37-43.
[147] CX-1, pp. 37-40.
[148] CX-1, pp. 40-43.
[149] CX-1, pp. 49, 63-74.
[150] CX-1, p. 49.

On 19 Jul 99, a Functional Capacity Evaluation (FCE) was performed. Claimant complained of throbbing pain in his lower back, aching in his bilateral buttocks, and occasional sharp pain down left lower extremity. Because Claimant's blood pressure was 140/105 with a resting heart rate of 100, cardiovascular testing was not performed. Claimant described his work duties with Employer as heavy. Claimant was given different tasks to perform. Claimant was capable of walking one mile, but had difficulty sitting for a prolonged period of time. Claimant was tested for symptom magnification, but inappropriate responses were not demonstrated during the test. As such, the FCE results can be considered valid. Based on the results of the FCE, Claimant can work at a medium demand level. Claimant can lift[151] 21-50 pounds occasionally, 11-20 pounds frequently, and 0-10 pounds constant.[152]

Dr. Igor M. Cherches' medical records state:[153]

Dr. Baker referred Claimant to Dr. Cherches for a neurological evaluation. Claimant informed Dr. Cherches that he responded well to the TENS unit and K-pad along with chiropractic maneuvers, but had no significant relief with the muscle relaxers or Vicodin. Neurological examination of the paraspinal muscles in the lumbar and lower thoracic spine showed dramatic tenderness to palpation with radiation into the left buttock and upper thoracic area that completely reproduced Claimant's symptoms.[154]

Based on Claimant's history and neurological examination, his recurrent lower back pain is "primarily muscle spasm with referred left S1 pain." There was no evidence of focal radiculopathy. There was a post-surgical scar formation with pressure on the left S1 nerve root, but it remains in the differential diagnosis. Dr. Cherches recommended a myelogram if Claimant did not respond within several months to aggressive conservative therapy. He further recommended continued physical therapy and TENS unit. He started Claimant on Neurontin and Flexiril.[155]

Dr. Robert Whitsell's medical records state:[156]

According to Dr. Whitsell, Claimant reached MMI on 21 Jun 99 and has an 11% impairment rating. Dr. Whitsell evaluated Claimant per Employer's request and not for treatment or care. He took a complete history, including present treatment and complaints. He also reviewed Claimant's medical records. Physical examination revealed a male weighing approximately 200 pounds who appeared comfortable and who arose without hesitation or support. Claimant did not wear a brace or utilize ambulatory aids, but had some lumbar soreness.[157]

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[151] According to Claimant, it hurts to pick up 10 pounds. He can lift up to 35 pounds, but he is in a lot of pain. CX-1, p. 73.
[152] CX-1, pp. 63-74.
[153] CX-1, pp. 51-52.
[154] CX-1, p. 51.
[155] CX-1, p. 52.
[156] CX-1, pp. 56-61.
[157] CX-1, pp. 56-59.

Claimant's lumbar flexion and extension range of motions were invalidated by supine straight leg raising measurements and the Waddell Test revealed tenderness. No range of motion impairment was demonstrated. Dr. Whitsell diagnosed Claimant with lumbar disc syndrome, post-surgical state with some residual symptoms. He noted the lumbar scar was well-healed and some residual lumbar tenderness was present particularly on the left side. Dr. Whitsell concluded Claimant reached MMI, reasoning that only minimal symptomatic treatment should be necessary in the future. He ordered Claimant to be retrained for a job that does not require heavy lifting. Claimant should not return to heavy work.[158]

Dr. Whitsell reexamined Claimant on 13 Mar 01. Claimant reported he had not returned to any type of work activity. Dr. Whitsell took an updated history. Dr. Baker recommended a second back surgery in March 2000, but Claimant decided he did not wish to have any further surgery. Claimant complained that he felt worse. He complained of pains in his spine from his lower to mid back with some radiating pain toward his left rib cage. He also complained of muscle spasms and pain in his buttock area radiating down his left leg with tingling and numbness. Claimant admitted his symptoms were sometimes relieved by massage, TENS unit and medication.[159]

Physical examination revealed a moderately obese male at 206 pounds. Claimant appeared uncomfortable during the examination and arose with hesitation and support of a cane in his left hand. Claimant had a 0% impairment to total lumbar range of motion because the lumbar flexion and extension ranges of motion were invalidated by supine straight leg raising measurements. Claimant walked slowly and with the use of a cane. Dr. Whitsell diagnosed Claimant with lumbar disc syndrome, post-surgical state with residuals at L4-5 and L5-S1. Dr. Whitsell noted that "overreaction was noted to be inappropriate, as well as light touch." In addition, Claimant's prognosis was somewhat guarded.[160]

Based solely upon examination, Dr. Whitsell determined Claimant could only perform sedentary type work, such as typing, computer input, or answering phones. He did not feel Claimant could return to his usual heavy type work. He reiterated his opinion that Claimant reached MMI as of 21 Jun 99 with a whole body impairment of 11%.[161]

Cleveland Primary Health Care's medical records state:[162]

On 21 Mar 02, Claimant still had back pain and some chest pain. He complained that the cold weather made his back hurt worse. His back was tender on palpation. He returned on 22 Apr 02 stating he was doing okay except, that his back hurt mostly when lying down at night. Claimant still had muscle spasms, but did not get the lab work or stress test done. Claimant returned monthly for refills on his medication. He continued to have back pain and tenderness. On 22 May 02, Claimant refused lab work.[163]

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[158] CX-1, pp. 60-61.
[159] CX-1, pp. 95-96.
[160] CX-1, pp. 97-98.
[161] CX-1, pp. 99-102.
[162] EX-25, pp. 93-101.
[163] EX-25, pp. 99-101.

On 25 Jun 02, claimant complained of increased blood pressure and requested refills on his medication. He still had muscle spasms, but stated he had decreased back pain. His back still felt better during his next follow-up on 29 Jul 02, but Claimant's blood pressure was 140/90. Claimant was unable to get the MRI. Claimant returned for another refill on his medication on 20 Sep 02. He also returned for a general check up. Claimant was doing well, but still experienced muscle spasms and lower back pain. Claimant's prescriptions for Darvocet, Soma, and Congard were refilled.[164]

Claimant continued to return for follow-ups and refills on his medication. Claimant's last follow-up on 15 Jan 03 reflected a blood pressure of 171/101 and obesity.[165]

Cleveland Physical and Occupational Therapy's medical records state:[166]

On 07 Mar 01, Dr. Cherlo evaluated Claimant for an impairment determination due to abnormal motion of the lumbosacral region. Claimant's total lumbar range of motion impairment is 12% to the whole person. Specifically, Claimant's spine impairment summary:

Due to specific disorder (lumbar)	10%
Range of Motion (lumbar)	12%
Neurological	0%
Spine Impairment total	21%

On 09 Mar 04, Dr. Cherlo ordered blood tests to check Claimant's kidney and liver functions due to his pain medications.[167]

Dr. Anand Basi's medical records state:[168]

On 19 Nov 04, Dr. Basi, an internist, evaluated Claimant because his medications and physical therapy were not helping. Dr. Basi recommended an MRI to evaluate Claimant's back pain. He also recommended blood tests to check Claimant's liver and kidney functions secondary to taking pain medications. Claimant suffers from depression which probably is also secondary to Claimant's chronic back pain.

Dr. Larry Likover's medical records state:[169]

Dr. Likover examined Claimant at the request of Employer. Physical examination revealed an overweight male with a large, well-healed lumbar spine scar. Standing erect, rotating the body, and light touching caused exaggerated pain responses. He also had an

[164] EX-25, pp. 96-98.
[165] EX-25, pp. 93-95.
[166] CX-1, pp. 92-94, 104.
[167] CX-1, p. 104.
[168] CX-1, p. 105.
[169] EX-28.

inappropriate response to bent knee raising as well as hip rotation. Dr. Likover reviewed the 16 Oct 97 CAT scan that revealed broad-based posterior central protrusion at L5-S1 and raised posterior protrusion at L4-5.[170]

Dr. Likover believes that Claimant's back injury resulted from a lifting episode while working, but that the objective findings are that of a degenerative disc disease. "No findings indicative of a significant or serious structural injury directly attributable to the work-related event." Dr. Likover was not surprised that the surgery Dr. Baker performed did not alleviate Claimant's pain because he did not believe the surgery was a medical necessity. Regardless, there is nothing about the surgery that should be disabling or limit Claimant's ability to return to work. Dr. Likover thinks Claimant's behavioral pattern manifested a chronic pain patient with symptom magnification, inconsistency, and probably secondary gain motives. Dr. Likover opined that Claimant is capable of returning to work were he desirous of dong so. He would not place any activity restrictions upon Claimant.[171]

Surveillance Report reflects:[172]

Claimant's daily activities from 14 Feb 01 through 17 Feb 01 were videotaped. On 14 Feb 01, Claimant was observed walking, standing, sitting, entering a vehicle and driving. Claimant did not display any visible pain or discomfort while performing these activities. Claimant was followed to physical therapy and was observed driving his car into the parking lot, parking his car, and exiting and walking toward the building using a cane. Claimant left the building using the cane, entering his vehicle, and driving away. Claimant was then followed to a restaurant. He was observed exiting the vehicle. Upon returning to his vehicle, Claimant walked without utilizing the cane. He was followed to his residence. Surveillance efforts were terminated due to a lack of further activity.[173]

An attempt to observe Claimant again was made on 17 Feb 01, but surveillance was terminated due to a lack of activity.[174]

Analysis

Nature and Extent of Disability and Suitable Alternative Employment

Employer agrees that there is a loss of wage-earning capacity, but disagrees as to the extent. Claimant maintains he suffers from a permanent total disability, while Employer argues there is suitable alternative employment, limiting Claimant to permanent partial disability. The parties agree that Claimant reached maximum medical improvement on 13 Mar 01. There is no disagreement as to permanency.

[170] EX-28, pp. 1-2.
[171] EX-28, p. 2.
[172] EX-25, pp. 146-150.
[173] EX-25, pp. 146-149.
[174] EX-25, p. 146.

Claimant is a 52 year-old man with a high school education. He worked as a welder's helper, pipefitter, saw mill worker, cowboy, and on an oilfield. He started working for Employer in 1990. He hooked up barges, ships and railcars, loaded trucks, and climbed tanks. Since his injury, his typical day includes sitting and lying down. He tries to raise crappies and sets traps for mud cats. Claimant complains that he cannot sleep and stays up most nights, but then crashes after 4-5 days. He is unable to keep a routine because of his pain medications and back pain. Claimant admitted that he has not sought work since he left Employer.

In August 1998, Claimant underwent back surgery with Dr. Baker. He received steroid injections and physical therapy after the surgery. Claimant's problems continued after the surgery and to some degree worsened. Claimant attempted to return to work, but since nothing was available, Dr. Baker took Claimant back off work status on 03 Jun 99. Claimant received continued medical treatment, but stopped treatment with Dr. Baker in 2000, before the recommended second surgery scheduled for 29 Mar 00. Claimant was examined by several independent medical examiners, including Dr. Whitsell. Dr. Whitsell placed an 11% impairment rating upon Claimant and opined he could only perform sedentary work, such as typing, computer input, or answering phones. However, the vocational expert testified Claimant is limited to entry level unskilled work because of his educational background.

Dr. Likover, another independent medical examiner, reported that he would not place any activity restrictions upon Claimant. However, his opinion is contradicted by the objective findings and opinions of the other medical doctors of record. The record includes a 2005 MRI showing instability, disc herniation, and stenosis. Claimant also exhibited decreased range of motion and sometimes needs a cane to ambulate. The weight of the medical evidence, along with Claimant's subjective testimony is contrary to Dr. Likover's opinion. Consequently, I give less weight to his blanket clearance for Claimant to return to unrestricted employment.

Employer sent Claimant to Dr. Kushwaha in 2005. Dr. Kushwaha reviewed Claimant's medical records and medications. He testified that it is "certainly possible" that Claimant could work for eight hours per day, but was concerned about Claimant's medication levels. He admitted that he did not know how many pills Claimant took per day, but opined that if it were 8-10 pills per day, Claimant needs to do something else for his back injury and consider having the second surgery. Dr. Kushwaha's uncertainty and reservation about the level of Claimant's medication undercuts his testimony that Claimant could work eight hour days.

Dr. Kushwaha opined that Claimant could sit and work for eight hours per day. Dr. Kushwaha conceded that he recommends that people with back instability and stenosis limit their sitting to one hour at a time. He also limited Claimant's walking and standing to 30 minutes to one hour at a time and pushing, pulling, and lifting to less than 10-15 pounds. Claimant's ability to squat, kneel, and climb is limited as well. He believed Claimant could work fine with normal breaks every four hours. Dr. Kushwaha opined that Claimant could do most types of office work since he could control his activity level. He also reviewed the labor market surgery and stated that Claimant could perform all the jobs identified. Dr. Kushwaha's restrictions are slightly

inconsistent. Although he stated that Claimant could sit for eight hour days, he also limited Claimant's sitting to one hour at a time. He then said Claimant would be okay with breaks every four hours. It is not clear whether the positions identified in the labor market survey allow for those restrictions.

Mr. Quintanilla, the vocational expert, reviewed Claimant's restrictions and noted that no restrictions were placed upon Claimant regarding his medications or depression. Mr. Quintanilla admitted, however, that dependability is essential in keeping a job and if Claimant continuously needed bed rest this would preclude his ability to go to work on a daily basis. Mr. Quintanilla performed two separate labor market surveys and concluded that Claimant could not return to his usual employment because his job was heavy and that was the only type of work Claimant has done. The only alternative for Claimant according to Mr. Quintanilla is entry-level unskilled work.

According to Mr. Quintanilla, light duty work was available for Claimant as of 13 Jan 05. Mr. Quintanilla identified several security guard positions which paid $8.25, $7.50, $7.25, $7.00, $6.50, and $6.00 per hour. He also identified a position as a general assembly operator, which paid $6.00 and $7.00 per hour and a computer analyst position which paid $7.00 per hour. These jobs are considered light work, which Mr. Quintanilla believed would be better suited for Claimant than a sedentary position.

However, Mr. Quintanilla did not testify that Claimant could do these jobs, but stated that Claimant should at least give it a good try to see how it works out. The evidence shows Claimant needs continued pain medication and has difficultly sleeping. His back pain and pain medication also affects his ability to drive.

Employer carries the burden of establishing the availability of suitable alternative employment. Mr. Quintanilla's testimony concessions that the pain medication and fatigue could be a problem, but that Claimant should give it a try and see how it goes, falls short of a credible opinion that Claimant can do any of the jobs identified. Moreover, Dr. Kushwaha expressed some hesitation, depending on the level of medication that Claimant was taking.

In short, it may be that Claimant could work in some capacity, particularly part-time. However, the burden is on Employer to establish that fact by the weight of the evidence. I find that the record does not establish that it is more likely than not that Claimant could reasonable perform any of the jobs identified by Employer. Consequently, I find Claimant suffered from permanent total disability from 13 Mar 01 to present and continuing.

Average Weekly Wage

The parties agree that Claimant worked for Employer for eighteen years prior to his 22 Jul 97 work-related injury. The parties have a $2.26 dispute as to the correct average weekly wage. Claimant contends that the average weekly wage is $819.90, while Employer contends the average weekly wage is $817.64.

The relevant 52 week period is from 22 Jul 96 through 21 Jul 97.[175] In the 52 weeks immediately preceding his work-related injury, Claimant earned $42,758.42.[176] The record does not indicate whether Claimant worked five or six days per week. Although the record provides how many hours per pay period Claimant worked, it did not break down the number of days. Since this Court could not determine Claimant's average daily wage using subsection 10(a) without knowing how many days per week he worked, Claimant's average weekly wage was determined by dividing his yearly earning by 52 weeks.[177] Claimant's average weekly wage is $822.27. This amount fairly and reasonably represents Claimant's earning capacity at the time of his injury.

Medical Care Benefits

Claimant seeks medical costs associated with his work-related injury to his back, which he alleges resulted in genital and heart problems as well. Claimant also suffers from depression. Claimant believes his heart and genital problems resulted from steroid injections. Dr. Baker gave Claimant steroid injections for his back and spinal condition. Claimant further believed if he refused the steroid injections, Employer would have determined that Claimant refused medical treatment. Claimant believes his rapid weight gain was caused by the steroid injections. He also had dramatic shrinkage to his penis.

Penile Surgery

Dr. Ringer successfully performed penile surgery and Claimant has regained function, even though he has a lot of scar tissue and residual pain. Claimant seeks reimbursement of the $7,000[178] cost for the surgery. Nothing in the record suggests Claimant was referred to Dr. Ringer by a treating physician. In fact, Claimant admits he did not seek preauthorization from Employer for the penile surgery and simply looked Dr. Ringer up in the phonebook. Claimant contends he was not required to seek preauthorization because Employer would not provide an MRI for four years, consistently denied paying for blood work, and it was an emergency situation. Other than Claimant's own testimony, nothing in the record reflects that Claimant was ever denied an MRI. In addition, Dr. Cherlo did not request blood work until 2004, while the penile surgery was in 2001.[179]

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[175] The Court used the same method of calculation as Claimant and Employer. However, it arrived at a different amount because the Court used the exact 52 weeks prior to Claimant's work injury, unlike Employer or Claimant. Employer argued that the relevant earning period is from 22 Jul 96 through 20 Jul 97, while Claimant maintained that the relevant earning period began on 23 Jul 96 and ended on 22 Jul 97, the date of the accident. The relevant time period is the 52 weeks immediately preceding the work injury. Therefore, the relevant time period is from 22 Jul 96 through 21 Jul 97.

[176] This amount was based on his paychecks for periods ending 04 Aug 96 through 03 Aug 97. The paycheck for 04 Aug 96, included work from 22 Jul 96 through 04 Aug 96, and was all relevant. The paycheck for 03 Aug 97 only included 2 relevant work days. Therefore only $233.16 ($1,165.84 * .2) was applied to Claimant's yearly earnings. The Court recognizes that it arrived at an amount in excess of that sought by Claimant.

[177] 33 U.S.C. §10(c).

[178] $6,300 was charged to Claimant's credit card. Claimant allegedly paid an additional $700 cash to Dr. Ringer for the surgery.

[179] Although there is no report providing the date of the penile surgery, the credit card bill reflects a date of service of 27 Mar 01. CX-9.

While Claimant's penile problem was serious, and may have led to extreme depression and suicidal ideation in the long term, it was not an emergency situation. Claimant had the time to look Dr. Ringer up in the phonebook, have a consultation, schedule the surgery, and undergo surgery. Although Claimant had suicidal thoughts, he was neither unconscious nor incapacitated. At any point before the surgery, Claimant could have contacted Employer to request authorization. Had Employer denied authorization, Claimant could have still had the surgery and sought reimbursement as he does now. Unfortunately, regardless of whether this Court would otherwise determine the penile surgery was reasonable and necessary,[180] since Claimant did not seek preauthorization, was not denied or neglected treatment, and the surgery was not an emergency, Claimant is not entitled to reimbursement for the $7,000 he spent on the penile surgery.

Heart Condition

Claimant clearly has heart problems. The question is whether his heart condition is related to his work injury. Claimant alleges that his cardiac condition was caused by the steroid injections. Claimant's wife testified he was in excellent health prior to his 1997 work injury and that his heart problems started after the steroid injections. Claimant had "exceptional stamina" and would regularly pick up large deer and ice chests with no problems. The steroid injections also caused him to gain a lot of weight. Prior to his work-related injury, Claimant weighed 160 pounds, but now he weighs 206-240 pounds. Since his work injury, Claimant must take daily heart medications, nitroglycerin, and check his blood pressure and heart with a gauge. He also had four heart attacks, including one in Dr. Ringer's office. Claimant never exhibited heart problems prior to his work injury.

Claimant's heart condition developed after his work injury and steroid injections. He continues to have hypertension. According to Claimant, Dr. Barnett confirmed that steroids could have caused the heart problems. Dr. Basi told Claimant that if he did not do something for his heart, he will "drop dead." Claimant's testimony regarding his medical treatment is credible and nothing in the record contradicts his testimony regarding his heart condition and treatment. The evidence is sufficient to invoke the presumption and Employer did not offer evidence to rebut it. As such, I find treatment for Claimant's heart condition is work injury related and treatment for it is a necessary and reasonable medical expense.

Depression

Claimant's wife sees a change in Claimant, specifically with regard to depression. Claimant did not suffer from depression prior to 22 Jul 97. He used to always be in "good spirits." Claimant did not begin taking antidepressants until after his work-related injury. Prior to his penile surgery, Claimant suffered from severe depression and attempted suicide. He admits, however, that the penile surgery helped get him out of his desperate psychological state.

[180] A determination that the penile surgery was reasonable and necessary is difficult since there are no medical records in evidence regarding the surgery or pre-surgery consultation, however, this Court understands that Dr. Ringer has passed away and his medical records are not available. A reasonable and necessary determination is unnecessary since Claimant failed to seek preauthorization and Employer did not refuse or neglect treatment. In addition, there was not an emergency situation requiring immediate surgery.

Even though the penile surgery helped his depression, he still deals with chronic depression related to his back injury. Zoloft helps Claimant almost "feel normal." Claimant's depression is directly related to his work related injury and treatment for such depression is reasonable and necessary. Therefore, treatment for Claimant's depression is a covered medical expense.

Back

Claimant injured his back on 22 Jul 97. Claimant has had continued back problems since his back surgery, steroid injections, and physical therapy. He takes Hydrocodone for pain and muscle relaxants. He was prescribed pain patches for a short period of time, but they made him throw up and gave him severe migraines. Claimant's wife confirmed that Claimant's medications caused migraines. At the request of Employer, Dr. Kushwaha evaluated Claimant. He opined that Claimant could either live with his symptoms or he could have a second surgery. If Claimant elected to undergo a second surgery, Dr. Kushwaha recommends he have a decompression and fusion. Dr. Kushwaha opined that Claimant needs more than what Dr. Baker did. A 2005 MRI revealed a herniation at L4-5, instability, and disc narrowing. Dr. Kushwaha further opined that Claimant's reluctance to undergo a second surgery is rational and he generally recommends patients live with back pain as long as possible.

Medical care for Claimant's back injury is reasonable and necessary. Employer even stated that Claimant has an "open invitation" to return to Dr. Kushwaha or anybody else for treatment for his back. It has been Claimant's personal decision not to seek continued treatment. Regardless, Claimant is entitled to all reasonable, appropriate, and necessary medical expenses related to his back. This includes a second back surgery and continuous blood tests to determine how Claimant's pain medications are affecting his liver and kidneys.

ORDER AND DECISION

1. Claimant's average weekly wage at the time of his work-related injury was $822.27.

2. Claimant suffers from permanent total disability beginning 13 Mar 01 to present and continuing and Employer shall pay compensation accordingly.

3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's 22 Jul 97 back injury, pursuant to the provisions of Section 7 of the Act. This includes recommended back surgery, MRIs, and blood tests. It also includes treatment for Claimant's heart problems and depression. It does not include reimbursement for the penile surgery with Dr. Ringer.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).[181]

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[182] A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

[181] Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *Grant v. Portland Stevedoring Co., et al.,* 16 BRBS 267 (1984).

[182] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. *Revoir v. General Dynamics Corp.*, 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. *Miller v. Prolerized New England Co.*, 14 BRBS 811, 813 (1981), *aff'd*, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **18 Feb 04**, the date this matter was referred from the District Director.